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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

TERRELL DON HUTTO, Director,
Virginia State Department of Corrections,

and

GENE M. JOHNSON, Superintendent,
Powhatan Correctional Center,
Petitioners,

v.

ROGER TRENTON DAVIS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS CORRECTLY APPLY *RUMMELL* V. *ESTELLE*, 445 U.S. 263 (1980), TO THIS CASE UPON REMAND FROM THE SUPREME COURT?

2. DID THE COURT OF APPEALS ERR IN FINDING THAT RESPONDENT'S SENTENCES CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT?

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OPINIONS BELOW

The opinion of the Court of Appeals *en banc* from which certiorari is sought is reported in 646 F.2d 123 (4th Cir. 1981), and is included herein as Appendix A. The first *en banc* opinion is reported in 601 F.2d 153 (4th Cir. 1979), and is included as Appendix B. The original panel decision is reported in 585 F.2d 1222 (4th Cir. 1978), and is included as Appendix C. The opinion of the District Court is reported in 432 F. Supp. 444 (W.D.Va. 1977).

JURISDICTION

The opinion of the Court of Appeals was handed down on April 7, 1981. The jurisdiction of this Court to issue the Writ of Certiorari in this case is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 18.2-248. Penalties for manufacture, sale, gift, distribution or possession of a controlled drug.—Except as authorized in The Drug Control Act, chapter 15.1 (§ 54-524.1 et seq.) of Title 54 of this Code, it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell, give or distribute a controlled substance.

(a) Any person who violates this section with respect to a controlled substance classified in Schedules I, II or III shall upon conviction be imprisoned for not less than five or more than forty years and fined not more than twenty-five thousand dollars; any person, upon a second or subsequent conviction of a violation of this section involving an opiate or synthetic opiate drug, may in the discretion of the court or jury imposing the sentence, be sentenced to confinement in the penitentiary for a term of life imprisonment or for any period not less than five years; provided, that if such person prove that he gave, distributed or possessed with intent to give or distribute a controlled substance classified in Schedule I or II other than marijuana only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 5 felony; and provided further, that if such person prove that he gave, distributed or possessed with intent to give or distribute marijuana or a controlled substance classified in Schedule III only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled substance to use or become addicted to or dependent upon such controlled substance, he shall be guilty of a Class 1 misdemeanor.

Provided, further, that if the violation of the provisions of this article consist of the filling by a pharmacist of the prescription of a person authorized under this article to issue the same, which prescription has not been received in writing by the pharmacist prior to the filling thereof, and such written prescription is in fact received by the pharmacist within one week of the time of filling the same, or if such violation consists of a request by such authorized person for the filling by a pharmacists of a prescription which has not been received in writing by the pharmacist and such prescription is, in fact, written at the time of such request and delivered to the pharmacist within one week thereof, either such offense shall constitute a Class 4 misdemeanor.

(b) Any person who violates this section with respect to a controlled substance classified in Schedules IV, V or VI shall be guilty of a Class 1 misdemeanor.

STATEMENT OF THE CASE

Roger Trenton Davis was indicted for two separate and distinct violations of the Virginia Drug Control Law. After trial by jury Davis was found guilty of selling marijuana for which he was sentenced to a term of imprisonment of twenty (20) years and fined ten thousand ($10,000.00) dollars. He was also convicted of possession of marijuana with intent to distribute for which he was likewise sentenced to a term of imprisonment of twenty (20) years and fined ten thousand ($10,000.00) dollars. Davis appealed his convictions to the Supreme Court of Virginia which denied his petition for writ of error.

The principle evidence against Davis came from the testimony of Danny Ray Eads. Eads, an inmate in the Virginia Correctional system, became concerned with his wife's usage of drugs and its effect upon the welfare of his two-year-old child. Eads approached state officials and offered to assist in the exposure and arrest of those persons supplying drugs to his wife and any illicit drug distributors, including Davis, who Eads

identified as an active drug dealer in the county where his wife resided.

The Commonwealth accepted Eads' offer of assistance and granted him a furlough from prison for the purpose of apprehending drug traffickers. He was placed under strict surveillance during the investigation, and at times wore a transmitter strapped to his body so that the police could hear and record his conversations with drug dealers.

Eads met Davis, with whom he had become acquainted in jail while Davis was charged with a different drug offense, and told Davis he wished to purchase drugs for himself and for some mutual friends at the prison. Davis advised that he could sell Eads a quarter pound of marijuana for one-hundred ($100.00) dollars. When Eads protested that the price was too high Davis said he could make up a seventy-five ($75.00) dollar bag.

Eads accompanied Davis to his home where Davis removed a portion of marijuana from a large plastic bag, weighed it on a small scale, and gave three (3) ounces of marijuana to Eads in exchange for seventy-four ($74.00) dollars. Davis also gave Eads some drug pills, including L.S.D. and other illicit controlled drugs. During this transaction Davis said he would like to blow up the State Police Headquarters. The conversations between Eads and Davis were transmitted via Eads' hidden transmitter and recorded by the police. These recordings were played for the jury.

The second charge against Davis resulted from a police raid of his residence. In Davis' bedroom the police discovered two sets of scales and other drug paraphernalia. A small plastic bag containing eight grams of marijuana was found in a jacket, and outside of the bedroom window the police found a large plastic bag, similar to the receptacle from which Davis took the marijuana sold to Eads, which contained one-hundred and sixty-eight grams of marijuana. Davis was found hiding in a closet.

After exhausting his state remedies Davis filed a petition for writ of habeas corpus in the United States District Court.

The district court granted the writ upon its belief that the sentence was grossly out of proportion to the severity of the crimes as to constitute cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. A panel of the Court of Appeals reversed the district court concluding that the sentences were neither cruel nor unusual. The Court of Appeals reconsidered the issue *en banc* and by a vote of 4 to 3, adopted the district court opinion and affirmed the issuance of the writ of habeas corpus. This Court vacated the judgment and remanded for further consideration in light of *Rummel* v. *Estelle*, 445 U.S. 263(1980). The Court of Appeals by a vote of 5 to 5 affirmed the district court.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

I

THE COURT OF APPEALS DID NOT APPLY *RUMMEL* v. *ESTELLE*, 445 U.S. 263 (1980), CORRECTLY TO THIS CASE UPON REMAND FROM THE SUPREME COURT.

This Court previously vacated the decision of the Court of Appeals *en banc* and remanded the case for further consideration in light of *Rummel* v. *Estelle*, 445 U.S. 263 (1980). *See*, 445 U.S. 947 (1980). Upon briefing and oral argument the Court of Appeals affirmed the district court's finding of cruel and unusual punishment on an equal division of the *en banc* court. *See*, Appendix A.

In arriving at this decision the Court of Appeals has failed to properly apply this court's decision in *Rummel* v. *Estelle*, to this case, and its decision conflicts with decisions of other courts of appeals.

The basis for the Court of Appeals' decision rests upon the four prong test enunciated in *Hart* v. *Coiner*, 483 F.2d 136 (4th Cir. 1973). The decision in *Hart* was rejected by this Court in *Rummel*, and there no longer exists any underpinnings for the decision of the Court of Appeals.

The first test utilized by the district court and adopted by the Court of Appeals was to look at the nature of the offenses. The district court found no element of violence and minimal, debatable danger to the person. In *Rummel,* this Court held that the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal. 100 S. Ct. at 1140.

The statute under which Respondent was convicted was passed for the purpose of interdicting the flow of narcotics, and to punish drug pushers. Drug trafficking, even in marijuana, is a generator of collateral crime, including violent crime, and the problem has reached epidemic proportions. *See, Carmona* v. *Ward,* 576 F.2d 405, 412 (2nd Cir. 1978), *cert. denied,* 99 S. Ct. 874 (1979).

Whether marijuana is dangerous or relatively harmless is the subject of hot debate among the experts, and remains a question properly left to the legislative branch of government. The power of punishment is vested in the legislative, not the judicial branch of government. The legislature not only defines what shall constitute a crime, but also selects the range of punishment. To authorize federal courts to supervise the length of sentences given by state courts will inevitably bring the courts into conflict with legislative judgments. In our system of government it is the legislature, not the judiciary, who is constituted the respond to the will and moral values of the people.

The second test was an examination of the purpose behind the punishment and a determination of less restrictive alternatives. The district court and the Court of Appeals referred to the fact that there was less than nine ounces of marijuana involved.

In *Rummel* this Court recognized that what is a "small" amount of money [drugs] is a matter of line drawing which is inherently subjective and thus properly within the province of legislatures, not courts. 100 S. Ct. at 1140. The Respondent was sentenced because he was a drug pusher, and the amount of drugs involved is irrelevant.

The third test was to compare the punishment imposed to corresponding sentences in other jurisdictions. The district court noted that the sentence of twenty years for distributing exceeded the maximum available in all but eight states and four states had a penalty greater than the twenty year sentence for possession with intent to distribute.

In *Rummel,* this Court countered a similar argument by holding that even if it was to be assumed that the statute employed against the defendant was the most stringent in the fifty states, that severity hardly would render defendant's punishment grossly disproportionate. 100 S. Ct. at 1143. Unless national uniform sentences are imposed upon the States, some States will always treat particular offenders more severely than other states.

In the fourth test the court considered the punishment available in the same jurisdiction for other offenses. The court noted that a maximum of twenty years could be imposed for murder in the second degree, abduction and attempted murder among others.

This Court in *Rummel,* however, observed that comparing crimes is inherently speculative since different crimes involved different societal interests. 100 S. Ct. 1143 n. 27.

The drug problem in this country has reached epidemic proportions. It not only touches the lives of those in the drug culture, but invades and permeates every aspect of society. The number of crimes which have a genesis in drugs is incalculable. It is little wonder that States have come to the conclusion that drug pushers must be dealt with severely. The whole fabric of our society is being torn apart by those who sell drugs. Rational people may disagree as to what punishment should be imposed upon drug dealers, but any such assessment is for the legislature and not the courts.

The opinion of the Court of Appeals conflicts with the decisions rendered by other federal courts of appeal. In *Hayes* v. *Bordenkircher,* 621 F.2d 844 (6th Cir. 1980), the defendant relied upon the four pronged test of *Hart* v. *Coiner,* which is the underlying basis of the decision in this case. The Sixth Circuit,

however, held that "*Rummel* v. *Estelle* removes the *Hart* test from our consideration." 621 F.2d at 848. This ruling is in direct conflict with that of the Court of Appeals in the present case.

Additionally, the Third, Eighth, and Ninth Circuits have held, citing *Rummel*, that the length of prison sentences generally falls within the discretion of the states, and *Rummel* precludes invoking the disproportionality principle as violative of the Eighth Amendment, except in capital punishment and unique factual circumstances. *See Government of Virgin Islands* v. *Berry*, 631 F.2d 214 (3rd Cir. 1980); *Britton* v. *Rogers*, 631 F.2d 572 (8th Cir. 1980); and *United States* v. *Wylie*, 625 F.2d 1371 (9th Cir.) *cert. denied*, 101 S. Ct. 863 (1980).

A panel of the Fifth Circuit in *Terrebonne* v. *Blackburn*, 624 F.2d 1363 (5th Cir. 1980), does appear to apply the disproportionality analysis, but a rehearing *en banc* has been ordered. *See*, 624 F.2d at 1372.

II.

THE COURT OF APPEALS ERRED IN FINDING RESPONDENT'S SENTENCE TO BE CRUEL AND UNUSUAL.

Upon examining Respondent's sentence in a rational manner there is nothing to support a finding that it is cruel and unusual. The Fourth Circuit has made a basic error in its analysis of Respondent's sentence. The court has failed to consider that Respondent was convicted of two separate and distinct offenses. The court has lumped the two offenses together to arrive at the sentence of forty years for possession and sale of less than nine ounces of marijuana.

The first offense for which Respondent was convicted was the sale of three ounces of marijuana to Danny Rae Eads. The Respondent knew that Eads was an inmate of the Virginia penal system who was on a furlough. The Respondent also knew that Eads intended these drugs to be distributed to inmates in one of Virginia's penal institutions, and with this

knowledge also furnished Eads with other drug pills, including L.S.D. For this offense the jury sentenced Respondent to twenty years and a fine. Any proportionality review must be of this sentence alone and not in combination with other sentences.

Under Virginia law applicable at the time of Respondent's trial the legislature had made it a serious felony to sell for profit any drugs classified as a Schedule I, II or III drug. *See* § 18.2-248. The legislature set the range of punishment for a violation of this law from five to forty years. In fact the Respondent received exactly one-half of the authorized punishment. Considering parole, which the Fourth Circuit declined to do, the Respondent would be eligible for parole in less than five years. It simply cannot be said that such a sentence is cruel and unusual when the jury knew the Respondent to be a drug dealer by vocation, that he was willing to sell drugs to be taken into a penal institution, and had probably sold drugs to the inmate's wife who had been left alone with an infant child. The trial judge who could have reduced this sentence, in addition to knowing what the jury knew, also knew that Respondent had previously been convicted of selling L.S.D. and was free on bail pending appeal when he committed the present offense.

The legislative purpose in enacting § 18.2-248 was to interdict and punish those persons who would sell controlled drugs for a profit. The legislature had recognized that if a person distributed marijuana only as an accommodation to another individual and not with intent to profit or to induce the recipient to use or become addicted to or dependant upon marijuana then his punishment would be a Class I misdemeanor. The maximum punishment for a Class I misdemeanor under Virginia law is twelve months in jail. § 18.2-11. Further the legislature made a determination that persons convicted solely of possession of marijuana the punishment again would be a Class I misdemeanor. § 18.2-250.

The legislative determination that the range of punishment for persons who sell controlled drugs for profit would be from five to forty years allows the sentencing authority to allocate an appropriate sentence by taking into consideration the

background of the defendant, and the nature of the crime. Selling drugs to be taken into a penal institution is certainly more serious than selling the same amount of drugs on the streets.

The Respondent's second conviction was for possession of marijuana with intent to sell. When the police went to Respondent's home they not only found eight grams of marijuana in a jacket, but also found one-hundred and sixty-eight grams of marijuana in a bag outside of the bedroom window. In addition the police found two sets of scales and other drug paraphernalia, the tools of the trade of a drug dealer. Again, this sentence must be viewed alone in any proportionality review.

The jury knew that Respondent was an active drug dealer and that the drugs found were not for his own use. The trial judge knew that Respondent had not been detered by his previous conviction and was continuing to pursue his trade while on bond from another drug conviction. *See Carmona* v. *Ward*, 576 F.2d at 406. Such conduct by Respondent would of necessity be viewed as constituting a serious offense by the jury, and they imposed a sentence which was half of the authorized punishment.

The Respondent did not attack the validity of § 18.2-248 on its face and thereby has accepted the legislature's classification of the sale of marijuana for profit as a serious offense. It cannot be said that Respondent's sentence of twenty years is without a rational basis or that it is such as would shock human sensibilities.

CONCLUSION

In affirming the finding of cruel and unusual punishment in this case, the Court of Appeals has relied upon the very tests which have been rejected by this Court in *Rummel* v. *Estelle*. By so doing the opinion of the Court of Appeals is in conflict not only with an applicable decision of this Court, but conflicts with the interpretation of *Rummel* by other Courts of Appeal.

This Court's decision in *Rummel* is dispositive of the very issue raised in this case, and the failure of the Court of Appeals to properly apply *Rummel* mandates that certiorari be granted and the judgment of the Court of Appeals be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, Deputy Attorney General of Virginia, of counsel for petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify on the 2nd day of July, 1981, I mailed a copy of the foregoing Petition for Writ of Certiorari to Edward L. Hogshire, Esquire, 500 Citizens Commonwealth Center, Post Office Box 1151, Charlottesville, Virginia 22902, and to John C. Lowe, Esquire, 409 Park Street, Charlottesville, Virginia 22903, counsel for respondent.

James E. Kulp
Deputy Attorney General

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1782

ROGER TRENTON DAVIS,
Appellee,

v.

JACK F. DAVIS, Director,
Virginia State Department of Corrections,

and

R. M. MUNCY, Superintendent,
Powhatan Correctional Center,
Appellants.

PER CURIAM:

The petitioner, a prisoner of the Commonwealth of Virginia, was convicted on charges of possession with intent to distribute and distribution of marijuana, and received two consecutive sentences of a $10,000 fine and twenty years imprisonment. The district court granted a writ of habeas corpus on the ground that these sentences were so disproportionate to the offenses as to constitute cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution. 432 F.Supp. 444 (W.D.Va. 1977). A panel of this court reversed. 585 F.2d 1226 (4th Cir. 1978).

Upon rehearing *en banc* on the motion of the petitioner, this court affirmed the district court's judgment. 601 F.2d 153 (4th Cir. 1979). The Supreme Court granted the respondent's petition for a writ of certiorari, vacated this court's judgment and remanded the case for further consideration in light of *Rummel v. Estelle,* 100 S.Ct. 1133 (1980).

The judgment of the district court is affirmed on an equal division of the *en banc* court.

AFFIRMED.

WIDENER, Circuit Judge, dissenting, in which dissent he is joined by Judges Russell and Hall.

I dissent to the refusal of the en banc court to reverse the judgment of the district court appealed from for the reasons set forth in detail in the panel opinion of this court at 585 F.2d 1226 (4th Cir. 1978),[1] and in the dissenting opinion to the opinion of the court in the first en banc consideration of this case found at 601 F.2d 153 (4th Cir. 1979).

Further, because the judgment of this court in the en banc decision in this very case, 601 F.2d 153 (4th Cir. 1979), was vacated and remanded by the Supreme Court[2] for further consideration in the light of *Rummel* v. *Estelle*, 445 U.S. 263 (1980), I think the decision in *Rummel* deserves special consideration. *Rummel*, as I see it, takes essentially the same view as does the panel opinion in this case which reversed the district court.[3] If that is true, as I think it is, the disposition of

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[1] In the panel opinion at page 1233, speaking to the sufficiency of the evidence we relied on *Williams* v. *Peyton*, 414 F2d 776 (4th Cir. 1969), which at that time was circuit precedent as to the sufficiency of evidence in habeas corpus review using the any evidence at all rule as found in *Thompson* v. *Louisville*, 362 U.S. 199 (1960). In 1979, however, *Jackson* v. *Virginia*, 443 U.S. 307 (1979), was decided, changing the standard for habeas corpus review from any evidence at all to one that required evidence which would permit "*any* rational trier of fact" . . ." to have found the essential elements of the crime beyond a reasonable doubt." (Italics in original.) Under the rule in *Jackson* v. *Virginia*, as in *Williams* v. *Peyton*, the evidence in this case not only permits the finding as to punishment by a rational trier of fact, it fully supports it. This is *not* a case of life imprisonment for a parking ticket, see *Rummel*, at 274, n. 11, or even a simple street corner sale of drugs from one high school child to another.

[2] 445 U.S. 947 (1980) sub nom *Davis* v. *Hutto*, No. 79-482.

[3] Specifically, the Supreme Court, in its opinion in *Rummel*, rejected our decision in *Hart* v. *Coiner*, 483 F2d 136 (4th Cir. 1973). *Hart* was relied on

(footnote continues)

the present en banc court in this case should have been a simple reversal for which no extensive opinion was necessary, if any opinion at all, for the various views of the law in this case had been sufficiently explored in the panel opinion and in the Supreme Court's opinion in *Rummel*.

Accordingly, I respectfully dissent.

(footnote continued)

by the district court in its opinion, and the only reason for the judgment of the en banc court given in its per curiam opinion, other than that less than nine ounces of marijuana was involved, was that it affirmed "for reasons sufficiently stated by the district judge in his opinion." 601 F2d at 154. The Supreme Court also construed *Weems* v. *United States*, 217 U.S. 349 (1910), in the same manner as did the panel in this case. The district court opinion which is affirmed in this case relied on *Weems* and *Hart* just as did the majority of the Fifth Circuit panel in *Rummel*, see 445 U.S. at 267, which was overruled by the Fifth Circuit sitting en banc, see 445 U.S. at 268. The en banc opinion of the Fifth Circuit, of course, was affirmed by *Rummel*. *Weems* and *Hart* are the essential roots of all the argument in this case, and the construction given by the district court to each of them has been specifically rejected by the Supreme Court in *Rummel*.

APPENDIX B

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1782

ROGER TRENTON DAVIS,

Appellee,

v.

JACK F. DAVIS, Director,
Virginia State Department of Corrections,

and

R. M. MUNCY, Superintendent,
Powhatan Correctional Center,

Appellants.

Decided June 29, 1979

PER CURIAM:

The petitioner was prosecuted in a court of the Commonwealth of Virginia upon charges of possession of marijuana with the intent to distribute and its distribution. Upon conviction, although less than nine ounces of marijuana were involved in the offenses, the court imposed a fine of $20,000 and a sentence of imprisonment of forty years. The district court concluded that the penalties imposed were so disproportionate to the offenses as to amount to cruel and unusual punishment in violation of the Eight Amendment to the Constitution of the United States. On that basis, a writ of habeas corpus was awarded, and the Commonwealth of Virginia has appealed.

We affirm for reasons sufficiently stated by the district judge in his opinion. 432 F. Supp. 444 (W.D. Va. 1977). This

action supersedes the panel opinion. 585 F.2d 1226 (4th Cir. 1978).

AFFIRMED.

WIDENER, Circuit Judge, dissenting, in which dissent he is joined by Judges Russell and Hall.

I respectfully dissent for the reasons expressed in the opinion of the panel. 585 F.2d 1226 (4th Cir. 1978).

In addition, I should note that I think both the district court and this court have usurped not only the function of a State legislature but also that of a State court and a State jury.

This is the first time, to my knowledge, in the history of Article III courts, that a federal court of appeals[1] has, without invalidating a statute, set aside the sentence of a State court imposing punishment for a term of years plus a fine, within State statutory limitations, as being cruel and unusual, and the error is compounded because the sentence itself, while imposed by the court, was fixed by a jury.

The majority opinion emphasizes, apparently as a principal reason for its decision, that less than nine ounces of marijuana were involved in the drug sale in question (for that is the only reason it gives aside from referring to the opinion of the district court). But, at the same time, it does not mention most relevant facts which were before the State court.[2] Davis was a previously convicted seller of drugs (LSD),[3] and known

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[1] *Downey* v. *Perini*, 518 F2d 1288 (6th Cir. 1975), set aside an indeterminate sentence for possession and sale of marijuana under Ohio law. Because the court held the minimum sentence invalid, I would construe the opinion as invalidating the statute.

It is acknowledged that the Supreme Court has neven taken such action.

[2] The district court also chose largely to disregard these facts in its opinion, for it mentioned few of them. Its continued emphasis was on "less than nine ounces."

[3] The district court in its opinion points out yet another conviction of Davis, prior to Davis' sentence here, for feloniously distributing marijuana. 432 F.Supp. at 448, n. 1. This marijuana conviction was only *one day* before the search which netted the authorities the 168 grams involved here.

drug dealer, who, when apprehended, was in possession of the typical paraphernalia of his vocation. He had sold drugs to the young wife of a prison inmate, who had a baby at home, which is what brought about the instant conviction. The marijuana sold here was being sent with Davis' knowledge into a State prison camp for use by the inmates, as was LSD and another illegal drug which were turned over by Davis for that purpose, at the time of the marijuana purchase, to the purchaser of the marijuana involved in this case.

While I would deny the authority of a federal court to inquire into the amount of Davis' punishment, rather requiring him to attack the statute involved,[4] on the facts of the case at hand, I think it cannot be said that Davis did not merit the punishment awarded, so that as a matter of fact as well as a matter of law his punishment was neither cruel nor unusual within the meaning of the Eighth Amendment.

I think the precedent we set here, setting ourselves up as a super State jury, is not only without legal precedent or authority, in the setting of our "charter of government" I think it is fraught with danger.

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[4] The en banc court could have taken this view upon respectable precedent as pointed out in the panel opinion.

APPENDIX C

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 77-1782

ROGER TRENTON DAVIS,

Appellee,

v.

JACK F. DAVIS, Director,
Virginia State Department of Corrections,

and

R. M. MUNCY, Superintendent,
Powhatan Correctional Center,

Appellants.

Decided October 30, 1978.

WIDENER, Circuit Judge:

This is an appeal from the issuance of a writ of habeas corpus in which case the district court set aside two sentences as being so disproportionately excessive as to constitute cruel and unusual punishment under the Eighth Amendment.

Roger Trenton Davis was convicted in a trial by jury in Wythe County, Virginia of the offenses of distribution of marijuana and possession of marijuana with intent to distribute. In his petition for a writ of habeas corpus, Davis attacked the severity of the sentences he received, as well as making other constitutional claims.[1] He contends that in this appeal the offense committed was minor; the facts constituting the case

[1] Davis made several additional constitutional claims which were dismissed by the district court. He does not appeal from their dismissal, and the issues are not before this court. The district court's opinion is reported at 432 F. Supp. 444 (W.D. Va. 1977).

against him reveal a relatively insignificant crime for which the Commonwealth's sanction should be correspondingly slight; and, in view of the claimed relative innocuousness of the act of selling marijuana in the amounts proven, the sentences imposed were disproportionate to the offense. While the district court granted the writ, we do not agree and we reverse.

I

Davis was sentenced to two twenty year terms, to be served consecutively, and fined $10,000 for each of the two counts. As is the practice in Virginia, the jury sentenced Davis upon its finding of guilt, and the court entered judgment on that verdict. *Va. Code Ann.*, § 19.2-295.[2]

The jury awarded the sentence after hearing evidence which revealed Davis to be a dealer in drugs who sold them to a man who had informed Davis that the drugs were being procured for distribution to inmates in a state penal institution. Davis sold not only marijuana but also two other drugs in pill form, all to be taken to the inmates.

The evidence against Davis centered principally in the testimony of Danny Ray Eads. Eads, an inmate at Bland prison farm, approached prison officials with a proposition concerning drug traffic in Pulaski and Wythe Counties. Eads was concerned by his wife's use of drugs (she had become a drug user after his confinement) and the consequent effect on the welfare of his two year old child; he told authorities that he desired a furlough from prison in order to assist in the exposure and arrest of those supplying drugs to his wife and any illicit drug distributor in the area, including Davis who Eads identified as an active drug dealer in Wythe County.

The Commonwealth accepted Ead's offer of assistance and allowed him a furlough for the purpose of apprehending drug traffickers in Pulaski and Wythe Counties. During the time of the investigation, Eads was under strict surveillance. As part of

[2] See *Vines* v. *Muncy*, 553 F2d 342 (4th Cir. 1977).

the investigation, for example, he wore a transmitter strapped to his body so that the police could hear and record his conversations with drug dealers.

Eads met Davis on the streets of Wytheville in front of a "head shop," a store specializing in the sale of drug paraphernalia. Eads testified that he and Davis had become acquainted in jail while Davis was in jail, having been arrested on a different drug offense. He told Davis that he wished to purchase some drugs for himself and for some mutual friends at Bland prison farm. Davis responded that he thought he could provide Eads with the contraband he needed, left, and returned ten minutes later. Eads then accompanied Davis to the latter's home.

There, the two men went into Davis' bedroom. Davis removed a portion of marijuana from a large plastic bag, weighed it on a small scale, and gave three ounces of marijuana to Eads in return for $74.00. Also, at that time, Davis gave Eads the drug pills which included L.S.D. and another illicit controlled drug. This conversation between Eads and Davis was transmitted via Ead's hidden transmitter and recorded by the police. That recording, as well as the recording, of Ead's initial contact with Davis, was played to the jury. Thus, the jury was intimately familiar with the conversation accompanying the transaction, including the participants' recognition that the purpose of the drug acquisition was for distribution to inmates in one of the Commonwealth's penal institutions, as well as Davis gratuitous statement that he would like to blow up the state police headquarters in Wytheville.

On October 26, 1973, law enforcement officials raided the Davis residence. In Davis' bedroom they discovered two sets of scales and other drug paraphernalia. A small plastic bag containing 8 grams of marijuana was found in a jacket. About fifteen feet outside of the bedroom window, officers discovered a large plastic bag, similar to the receptacle from which Davis drew the marijuana sold to Eads, contining 168 grams of marijuana. Davis was discovered hiding in a closet and told the officers they could not search anything except his room.

Faced with this evidence, the Wythe County jury was obviously impressed by Davis complete involvement in the business of selling drugs. While not given all the details, the jury knew from Eads' testimony that this was not Davis' first trouble with the law in a drug related offense. The evidence clearly allowed the jury to see the petitioner as an active drug dealer and not new at the business. He was, instead, an individual fully aware of the nature of his illegal activity, who, aware of the purpose for which the drugs were being procured, was in the business of selling drugs for profit. Accordingly, the jury awarded the petitioner a sentence which it believed was appropriate for such an offender. The trial court, with a more detailed comprehension of Davis record of prior drug offenses, chose to enter judgment on that verdict, and directed the sentences to be served consecutively. A reasoned decision on whether the sentences were cruel and unusual must do more than to take these facts into account; it must accept the facts as an indication of the nature of the crime committed.[3]

II

A.

In the petition for a writ of habeas corpus and in argument, Davis has contended that the sentences imposed upon him are so excessive as to be disproportionate to the crime he commited. Although we recognize that the Eighth Amendment "proscribes punishment grossly disproportionate to the severity of the crime," see *Ingraham* v. *Wright*, 430 US 651, 667 (1977), Davis' argument would require us to find cruel and unusual a sentence for a term of years and a fine, both of which are within the limits set by statute. Under Virginia law, the distribution of controlled substance, such as marijuana, and the possession of the same for distribution were punishable by a term of imprisonment not less than five nor more than forty years and by a fine of no more than $25,000. *Va. Code Ann.*, 1974 Repl. Vol.,

[3] Davis does not contend that the sentences authorized by the Virginia statute are on their face cruel and unusual. Rather, he points to the excessiveness, in his particular case, of the sentence awarded by the jury and imposed by the court, relying on *Hart* v. *Coiner*, 483 F2d 136 (4th Cir. 1973), cert. den., 415 U.S. 938 (1974). Hence, we should examine the nature of the factual case against Davis, and, as in any other criminal case, draw all inferences in favor of the Commonwealth, for we inquire, in a habeas corpus proceeding, only as to whether there was any evidence at all to support the judgment of the State court. *Williams* v. *Peyton*, 414 F2d 776 (4th Cir. 1969).

§ 54-524.101:1; see *Va. Code Ann.* § 18.2-248.[4] Davis was sentenced to twenty years imprisonment and a $10,000 fine for each count, punishment well within the limits imposed by the statute. Hence, we are faced with the question of what is the proper inquiry into the severity of a jury-awarded and court imposed sentence, when the challenged punishment is a term of years and fine which fall within the limits imposed by statute?

B.

We begin our inquiry with the observation that the Supreme Court has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment under the Eighth Amendment. *Downey* v. *Perini*, 518 F2d 1288, 1290 (6th Cir. 1975), vacated for reconsideration in the light of an Ohio statute 423 US 993 (1975).[5]

The Supreme Court decisions upon which Davis places primary reliance clearly is not such a case. *Weems* v. *United States*, 217 US 349 (1910) involved more a question of the method of punishment than the length of the prison term. The defendant, an official of the Philipine government, was convicted of falsifying public records and sentenced to fifteen years imprisonment, *cardena temporal*.

The presence of the sanction *cardena temporal* prevents the *Weems* opinion from stating a holding on a challenge to the mere length of a prison sentence; it indicates that the decision deals with the conditions accompanying the service of the sentence and the disabilities which followed the convict even after release from confinement.

---

[4] If the distribution, or the possession for distribution, of the marijuana had not been for profit, or to induce the use thereof or addiction thereto, but merely as an accomodation to another individual, Davis would only have been guilty of a Class 1 misdemeanor. § 54-524.101:1. A Class 1 misdemeanor is punishable by confinement in jail not to exceed twelve months, or a one thousand dollar fine, or both. *Va. Code Ann.* § 18.2-11.

[5] In *Howard* v. *Fleming*, 191 US 126 (1903), the Court, considering only the length of the sentence, held that a ten year sentence for swindling by means of a pretended gold brick was not cruel and unusual.

Cardena temporal was an hispanic sanction, carried over into Fillipino law from the jurisdiction's Spanish antecedents. The punishment involved a sentence of from twelve to twenty years imprisonment, at "hard and painful labor" with "a chain at the ankle, hanging from the wrists." *Id.*, at p. 364. Moreover, the imposition of *cardena temporal* stripped the convict of "the right of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts *inter vivos*. . ." (Civil interdiction); it placed him under surveillance by the state for the remainder of his life, including getting permission even to change residence, and it stripped him of the right to hold public office, to vote, or to receive honors or retirement pay. *Id.*, 364-365.

Thus, the sentence imposed upon Weems constituted more than a prison sentence and a fine. Rather, as the Court observed, after the "prison bar and chains [were] removed," Weems would go, not to freedom, but to "a perpetual limitation of his liberty." *Id.*, at p. 366. The deprivations incidental to the imposition of *cardena temporal* colored the sanction and required the invalidation of the sentence imposed on Weems. The loss of political rights, the subjection of the convict to perpetual state surveillance, and the terrible incidents of the prison term, including the painful labor in chains and shackles, shocked the Court into the decision it made. Clearly, the incidents of *cardena temporal*, and not the mere length of a fifteen year prison term for an unfaithful public servant, prompted the Court to the decision it reached.

This conclusion is buttressed by the later portion of the Court's opinion in *Weems* wherein the Court confronts a plea by the United States to sever the prison term from the incidents of *cardena temporal*, leaving the former in force while voiding the latter. The Court's response was plain and to to the point: the incarceration was inseparable, under Phillipine law, from the incidents of *cardena termporal*, *Id.*, at p. 382, the imposition of *cardena temporal* was required by that law, *Id.*, at p. 381; and *cardena temporal* was in violation of the Eighth Amendment, *Id.*, at p. 382. Therefore, the decision rests, not on the length of the prison sentence, but on the incidents of its service

and consequential and life-long restrictions on liberty which followed the prisoner's release from prison.

Davis has also placed reliance on *Robinson* v. *California*, 370 US 660 (1962) in arguing that the Supreme Court has spoken on the issue of whether a sentence, by its length alone, may be cruel and unusual. That reliance is misplaced. *Robinson* involved the application of the Eighth Amendment to "impose substantive limits on what can be made criminal and punished as such." *Ingraham* v. *Wright*, 430 US 651, 667 (1977). The Court merely held that the Constitution forbade the incarceration of a narcotics addict as a criminal. Thus, the decision related to the criminality of the status of an offender, forbidding the use of criminal sanctions against such individuals, regardless of the severity or leniency of the sentence. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson, supra*, 370 US at p. 667.

C.

Even though the court has never held an otherwise lawful sentence for a term of years to be cruel and unusual, Davis correctly indicates that there is discussion in some of the cases which sets out a doctrine under which a sentence may be set aside as cruel and unusual if it is "grossly disproportionate to the severity of the crime." See *Ingraham* v. *Wright*, 430 US 651, 667 (1977).

Davis has not attacked the validity of the statute imposing the sentence for his crime; he has instead claimed that, in his particular case, the sentences imposed upon him were cruel and unusual even though they were within statutory limits. While some circuits rule that an attack on a sentence with statutory limits will be considered an attack on the sentencing statute, see e.g., *Pependrea* v. *United States*, 275 F2d 325 (9th Cir. 1960), cf. *Weems*, p. 382, this circuit apparently allows a convict to present a claim in the manner by which Davis has proceeded, i.e. whether the "sentence *in the case* is so excessive and disproportionate to the underlying offenses as to constitute cruel

and unusual punishment." (italics in original) *Hart* v. *Coiner*, 483 F2d 136, 139 (4th Cir. 1973), cert. den. 415 US 938 (1974).

Davis' contentions as well as the district court's opinion are based upon an implementation of the analysis followed in *Hart* v. *Coiner*. However, the circumstances here, especially the imposition of sentences consisting of terms of years within the periods authorized by statute, make reliance on the *Hart* analysis misplaced.

The district court borrowed from *Hart* the guidelines which were used in that decision to determine the constitutionality of the sentence imposed. The guidelines included the nature of the offense committed, the legislative purpose behind the punishment, the punishment imposed in other jurisdictions for the same offense, and the punishment imposed in the same jurisdiction for other offenses. While these factors may be proper to consider in certain cases under the Eighth Amendment, we do not believe that *Hart* meant them to be mandatory or all inclusive in each such case. Cases contemporaneous with, before, and after *Hart* make that apparent.

To begin with, we should note that, like the Supreme Court, we have never set aside a sentence for a term of years, as in violation of the Eighth Amendment, because of excessive length. In *Ralph* v. *Warden*, 438 F2d 786 (4th Cir. 1970) we set aside a death sentence for rape in which the victim's life was neither taken nor endangered because the sentence was "so disproportionate," p. 793; in *Hart* v. *Coiner* we disapproved imprisonment for life for recidivism for conviction of three felonies[6] because the sentence was "so excessive and disproportionate to the underlying offenses," p. 139; and in *Roberts* v. *Collins*, 544 F2d 168 (4th Cir. 1976) we set aside five years of a twenty year sentence for assault, because assault (with no maximum sentence) was a lesser included offense of assault with intent to murder. Following a guilty plea to assault

[6] Passing a $50.00 check with insufficient funds, transporting forged checks in the amount of $140.00 across the state lines, and perjury. See *Hart*, p.138.

as a lesser included offense of one crime charged,[7] we held ". . . the Constitution does not sanction the imposition of a greater punishment for a lesser included offense than lawfully may be imposed for the greater offense," p. 170. Other than these three cases, no case is called to our attention in which we have awarded relief to a prisoner under the Eighth Amendment for relief from a sentence within the bounds of a statute. None of them nullify a sentence of a term of years because of length, and none modify or limit the cases we analyze below which were decided under the Eighth Amendment.

In *United States* v. *Martell*, 335 F2d 764 (4th Cir. 1964) we held, in denying relief from a forty year sentence for kidnapping, that "[w]here the sentence is within the limit set by the statute, we are barred, except in the most exceptional circumstances, from any inquiry we might otherwise be inclined to make," p. 766 In *Stevens* v. *Warden*, etc., 382 F2d 429 (4th Cir. 1967), although we termed a twenty year sentence for armed robbery "shocking" because of the circumstances of the case, we held ". . . the federal courts have no right to review any sentence of a state court which does not exceed the statutory maximum sentence which may be imposed under the laws of the state," p. 433. In *Robinson* v. *Warden, etc.*, 455 F2d 1172 (4th Cir. 1972) we held that a fifteen year sentence for assault with intent to commit murder was not cruel and unusual because "[t]he 15-year sentence was within the range of punishment allowed by Maryland law, and the sentence was not disproportionate to the crime," p. 1177.

Hart previously mentioned, followed in 1973, accompanied by its companion case decided the same day, *Wood* v. *South Carolina*, 483 F2d 149 (4th Cir. 1973), which denied relief from concurrent five year sentences for making obscene telephone calls. While we discribed the statutory maximum of ten years as "startling," having been increased from six months, we held the sentences were not "so excessive and disproportionate as to constitute cruel and unusual punishment,"

[7] Roberts was charged both with assault and assault with intent to murder. The maximum sentence for assault with intent to murder was 15 years.

p. 150. We noted that there were no objective factors establishing disproportionately, and referred to *Hart*, but did not follow the analysis of that case.

After *Hart* and *Wood*, in other Eighth Amendment cases we have followed the pattern of *Martell*, *Stevens*, and *Robinson*.

In *United States* v. *Wooten*, 503 F2d 65 (4th Cir. 1974), citing *Martell*, but not *Ralph* or *Hart*, we affirmed a two year maximum sentence for a gun law conviction because "[i]t has been decided by this court that interference with a sentence which is within the limitation provided by statute is not, in the absence of extraordinary and special circumstances, within the appellate court's province," p. 67. In *United States* v. *Atkinson*, 513 F2d 38 (4th Cir. 1975) we affirmed sentences of twelve and four years for young adult offenders without the *Hart* analysis.

Yet other cases have distinguished *Hart*. In *Griffin* v. *Warden, etc.* 517 F2d 756 (4th Cir. 1975) we denied relief following conviction under the same West Virginia recidivist statute at issue in *Hart*. Our only distinction was that the convictions of felony by Griffin (burglary, breaking and entering, and grand larceny) "are not at all like those of Hart," p. 757, but "involve the potentiality of violence and danger to life as well as property," p. 757. We then said: "Whether or not Griffin may be actually deserving of such extreme punishment is not within our province to decide; we hold only that the imposition of a life sentence predicated upon these particular three offenses does not offend the eighth amendment," p. 757. The court did not engage in any further distinction of Hart except its comparison of the offenses upon which the convictions were based. In *Hall* v. *McKenzie*, 537 F2d 1232 (4th Cir. 1976) we denied habeas corpus relief on account of a 10-20 year sentence for non-forcible rape of a minor. We held that *Hart* had no application because of a "number of factors."[8] p. 1235. The first factor listed was the severity of the sentence, referring to the difference between life and 10-20 years. The

[8] *Ralph* was held to have no application because it involved the death penalty "which occupies a special place in eighth amendment jurisprudence."

case also pointed out that its measuring up to one of the *Hart* guidelines was questionable (the sentence allowable in other states), and that this crime was against the person. We held Hart not determinative and said "[a] more apt precedent is *Wood,*" p. 1236, which was decided without the *Hart* analysis as we have noted.

In view of circuit precedent, we are of opinion that the scope of inquiry into the constitutionality of a legal sentence for a term of years need not be as broad as the inquiry used in *Hart* when a life sentence was imposed. In an attack for excessiveness on a sentence for a number of years, any authorized inquiry of the court should extend only to the consideration of the seriousness of the offense committed and the application of the sanction imposed for that offense. We can give no relief unless the sentence imposed is "grossly disproportionate to the severity of the crime." *Ingraham* v. *Wright,* 430 US 651, 667 (1977). And in those cases where the challenged sentence is fixed by a jury within the limits imposed by statute, we afford special deference to the legislative and jury determination of the seriousness of the offense, and whether the punishment is cruel and unusual. See *Gregg* v. *Georgia,* 428 US 153, 174-184 (1976). Thus, the sentence will not be considered grossly disproportionate to the severity of the offense unless there are "extraordinary and special circumstances" which make an otherwise valid sentence cruel and unusual. *United States* v. *Wooten,* 503 F2d 65, 67 (4th Cir. 1974).

This rule antedates the *Hart* opinion and, as we have shown is unaffected by *Hart.* Nor is the rule peculiar to this circuit, it seems to be generally accepted by various courts of appeal. See *United States* v. *Dawson,* 400 F2d 194 (2d Cir. 1968) cert. den. 393 US 1023 (1969); *Page* v. *United States,* 462 F2d 932 (3d Cir. 1972); *Yeager* v. *Estelle,* 489 F2d 276 (5th Cir. 1973), cert. den. 416 US 908 (1974); *United States ex rel. Sluder* v. *Brantley,* 454 F2d 1266 (7th. Cir. 1972); *United States* v. *Wilson,* 506 F2d 521 (9th Cir. 1974); *United States* v. *MacClain,* 501 F2d 1006 (10th Cir. 1974); Contra: *Downey* v. *Perini, supra.* In fact, as we have noted, some circuits are more strict than are we, refusing to allow the convict to argue that the

sentence imposed was cruel and unusual in his particular case, considering such a claim an attack the sentencing statute itself. See also *Dawson*, p. 200.

Therefore, assuming we have any power to review the sentence, cf. *Stevens*, p. 433, we arrive at the same conclusion reached by the Fifth Circuit that a sentence for a term which is within the limits set out by statute will not be considered cruel and unusual unless it is so disproportionate as to "shock [ ] human sensibilities." *Yeager* v. *Estelle* 489 F2d 276 (5th Cir. 1973), cert. den. 416 US 908 (1974). And, even in such cases, judicial inquiry also may only inquire whether there are extraordinary and special circumstances which taint what would otherwise be a perfectly legal sentence.

Examining this case for extraordinary and special circumstances which would indicate that the sentences given Davis were constitutionally disproportionate to the offenses he committed, we find no indication of such disparity as to shock human sensibilities, if any disparity at all. The evidence shows the defendant to be a drug dealer by vocation who was willing to sell illegal narcotics to inmates of a penal institution, and probably as well to the wife of an inmate left alone with an infant child. The jury therefore had the right to consider the offense a very serious crime. By not attacking the sentencing statute on its face, Davis has accepted the legislature's classification of the sale of marijuana as a serious offense; he must prove that, in his particular case, the offense was not serious or was mitigated in some way which necessarily precluded the imposition of the sentence awarded. But recordings of the transaction between Eads and Davis were played to the jury, as well as other damning evidence admitted. The jury was familiar with the nature of the transaction as well as the defendant's drug selling business. We cannot say that the jury could not have been impressed by what it heard, and it has a right to consider all the evidence in fixing the sentences.

Finally, the trial judge, who could have sentenced concurrently, sentenced consecutively. Not only had he heard the witnesses testify, which we have not; he knew, for example,

which the jury did not, that Davis previously had been convicted of selling LSD and that the two offenses for which Davis had just been found guilty were committed while on bail pending appeal from the previous conviction for selling LSD.

Thus, we are unable to say that there is no evidence at all, *Williams* v. *Peyton*, 414 F2d 776 (4th Cir. 1969), to support the conclusion by the jury and trial court that Davis committed serious crimes which might deserve the punishment awarded. Finding no extraordinary and special circumstances, and being of opinion that the sentences do not shock human sensibilities, we conclude that the sentences imposed on Davis were neither cruel nor unusual.

Accordingly, the judgment of the district court is reversed.

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NO. 81-23

IN THE

Supreme Court of the United States

October, 1981

TERRELL DON HUTTO, Director
Virginia State Department of Corrections

AND

GENE M. JOHNSON, Superintendent
Powhatan Correctional Center,
Petitioners,

v.

ROGER TRENTON DAVIS,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS CONSIDER RUMMEL IN DECIDING THE CASE ON REHEARING EN BANC, AND PROPERLY DETERMINE THAT RUMMEL DOES NOT COMPEL REVERSAL OF THE DISTRICT COURT DECISION?

2. DID THE COURT OF APPEALS CORRECTLY HOLD THAT THE DISTRICT COURT, RELYING ON OBJECTIVE FACTORS UNIQUE TO THIS CASE, PROPERLY RULED THAT DAVIS' SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81-23

TERRELL DON HUTTO, Director
Virginia State Department of Corrections

AND

GENE M. JOHNSON, Superintendent,
Powhatan Correctional Center,

Petitioners,

V.

ROGER TRENTON DAVIS

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR

WRIT OF CERTIORARI

OPINIONS BELOW

The latest opinion of the Fourth Circuit en banc is reported at 646 F.2d 123. The first en banc decision of the Fourth Circuit is reported at 601 F.2d 153, and the original panel decision is reported at 585 F.2d 122. The opinion of the United States District Court is reported at 432 F. Supp. 444.

JURISDICTION

Same as cited by Petitioners.

STATUTES INVOLVED

Virginia Code Annotated, § 18.2-10, as amended:

PUNISHMENT FOR CONVICTION OF FELONY.

> The authorized punishments for conviction of a felony are:
>
> (a) For Class 1 felonies, death, or imprisonment for life.
>
> (b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.
>
> (c) For Class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.
>
> (d) For Class 4 felonies, a term of imprisonment of not less than two years nor more than ten years.
>
> (e) For Class 5 felonies, a term of imprisonment

of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(f) For Class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both. (1975, cc. 14, 15; 1977, c. 492).

Virginia Code Annotated, § 18.2-248, as amended;

PENALTIES FOR MANUFACTURE, SALE, GIFT, DISTRIBUTION OF POSSESSION OF A CONTROLLED DRUG.

Except as authorized... it shall be unlawful for any person to manufacture, sell, give, distribute or possess with intent to manufacture, sell give or distribute a controlled substance.

(a) Any person who violates this section with

respect to a controlled substance classified in Schedules I, II, or III shall upon conviction be imprisoned for not less than five nor more than forty years and fined not more than twenty-five thousand dollars. .

Virginia Code Annotated, § 18.2-248.1, as amended:

PENALTIES FOR SALE, GIFT, DISTRIBUTION OR POSSESSION WITH INTENT TO SELL, GIVE OR DISTRIBUTE MARIJUANA.

Except as authorized... it shall be unlawful for any person to sell, give, distribute or possess with intent to sell, give or distribute marijuana.

(a) Any person who violates this section with respect to:

(1) Not more than one-half ounce of marijuana is guilty of a Class 1 misdemeanor;

(2) More than one-half ounce but not more than five pounds of marijuana is guilty of a Class 5 felony;

(3) More than five pounds of marijuana is guilty of a felony punishable by imprisonment of not less than five nor more than thirty years. .

STATEMENT OF THE CASE

Respondent, Roger Trenton Davis, was tried before a jury on March 18, 1974 in the Circuit Court of Wythe County, Virginia, and was convicted of distribution of marijuana and possession of marijuana with intent to distribute. Although the total quantity of marijuana involved in the two offenses was less than nine ounces, Davis was sentenced to twenty (20) years of imprisonment and fined Ten Thousand Dollars ($10,000.00) on each of the two charges, pursuant to Virginia Code § 18.2-248. (Later amended, as will be discussed more fully below). The sentences were to be served consecutively. Davis filed a Petition for Writ of Error with the Supreme Court of Virginia, which denied

his petition, thereby affirming the judgment of the lower court.

Davis then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Virginia. After a plenary hearing there, Chief District Judge James C. Turk granted the writ, finding Davis' punishment to be cruel and unusual in contravention of the Eighth Amendment. See Davis v. Zahradnick, 432 F. Supp. 444 (W.D. Va. 1977).

The Commonwealth appealed to the Fourth Circuit, which reversed the district court in a decision authored by Judge Emory Widener. See Davis v. Davis, 585 F.2d 1226 (4th Cir. 1978). Davis filed a petition for rehearing en banc, and on June 29, 1979 the Fourth

Circuit, sitting en banc, reversed the panel decision in a brief per curiam opinion, affirming the judgment of the distict court, which had found the sentence imposed to be grossly excessive and in violation of the Eighth Amendment. Davis v. Davis, 601 F.2d 153 (4th Cir. 1979). The Commonwealth then filed a Petition for a Writ of Certiorari in this Court, which vacated the circuit court decision and remanded the case for further consideration in light of Rummel v. Estelle, 445 U.S. 263 (1980). See 445 U.S. 947 (1980). Following a second hearing en banc and a reconsideration of the case based upon Rummel, the Fourth Circuit reaffirmed its earlier decision. Hutto v. Davis, 646 F.2d 123 (4th Cir. 1981).

This case was originally tried in Wythe County, Virginia, on March 18, 1974. Shortly before trial, the Commonwealth agreed through a stipulation that the marijuana possession charge involved only 168 grams found in the back yard behind the Davis residence. The remainder, approximately three ounces, was allegedly sold to Danny Ray Eads for $74.00, the money having been provided Eads by the police.

Eads, the central figure in Davis' apprehension, a 20-year old convicted felon, had sought a furlough from nearby Bland Correctional Center and was asked to assist in the arrest of several persons, one being the defendant, on drug related charges. He testified on direct examination that he sought a furlough so he could "bust

those persons selling drugs to his wife" and to protect the welfare of his two-year old daughter. While denying he had made a "deal" with the authorities, he admitted that he had been subjected to a violent homosexual assault during his previous incarceration and had attempted a suicide (cut his wrists) just before being denied a furlough in September, 1973. He conceded on cross examination that his true motive for offering assistance to the police was that of "getting [his] daughter away from [his] wife." It was also elicited on cross examination that Eads anticipated being paroled on June 4, 1974, less than three months following his testimony at the Davis trial. He was shown as a desperate man who would do anything to secure his freedom.

Eads testified that after his furlough in October, 1973, he met with police and devised a scheme to make a purchase of drugs from Davis and others. During cross examination he conceded that when he first encountered Roger Davis on Main Street in Wytheville, with the police watching, it was he, Eads, who first broached the subject of drugs.

He then proceeded to Davis' home where he allegedly purchased less than three ounces of marijuana for $74.00. Although other contraband was allegedly given to Eads, no other charges were pressed against Davis. Although Eads was apparently wired for sound, given the extremely poor quality of the recordings, it is not clear from the record what portions of Eads' conversation with Davis, if any, were audible to the jury.

At the ore tenus hearing conducted July 6, 1976, in the district court, Davis presented the expert testimony of Dr. Dorothy B. Whipple, a noted authority on children's diseases and author of many works on drugs and drug abuse. Dr. Whipple's testimony provided a scientific basis upon which to measure the danger to society posed by the underlying offences in question.

Based on her many years of study of this area of medicine, Dr. Whipple stated unequivocally that the use of marijuana does not lead to physical or mental deterioration and that the drug is not addicting in a physiological sense. She analogized the "habit-forming" effects of marijuana smoking to those of drinking a glass of orange juice for breakfast, noting that of all recreational drugs, such as alcohol and tobacco, marijuana "is

probably the least harmful." (Emphasis added)

On cross examination, Dr. Whipple was asked whether tetrahydrocannabinol (THC, the active chemical in marijuana) is toxic, to which she replied that "of all the psychoactive drugs, marijuana is the least likely to produce death." She pointed out that a person can die from alcohol quite easily given a big dose, but that no death has ever been reported in the United States due to marijuana alone. When asked whether criminal penalties were not a help to a young person in combatting peer pressure to smoke marijuana, Dr. Whipple responded that she thought that "the law has had absolutely no effect whatsoever in reducing the amount of marijuana used among youth." She further noted that while penalties for marijuana possession and

usage had increased, during the same period of time the use of marijuana had "crescendoed."

Pursuant to the Commonwealth's request that they be given an opportunity to produce their own expert testimony concerning the use and effects of marijuana, a de bene esse deposition was conducted on August 26, 1976, of Dr. William P. Moore, a clinical psychiatrist practicing in Jenkintown, Pennsylvania. He testified as to alleged harmful effects of marijuana usage based upon studies he had performed. On cross examination, Dr. Moore admitted that only routine neurological tests were performed on his subjects and that less than half had been given the standard battery of psychological tests. Moore could not deny that he based his findings upon his patients' own perceptions of their

symptoms without any independent observation of those systems outside of the doctor's office.

Evidence was also presented in the district court to show the number of persons convicted of drug-related offenses in Virginia and the lengths of sentences given for such offenses. A precise computation was introduced, through a stipulation, which specified that during the period between October 31, 1975 and August 19, 1976, out of a total of 117 inmates who were committed in Virginia for possessing, selling and/or manufacturing marijuana, the average sentence for these offenses was 3 years, 2 months; the maximum sentence (for any quantity) was 15 years.

Further evidence of the nature of punishment rendered in Virginia, and elsewhere, was provided in a Supplemental Stipulation of Fact con-

sisting of a letter from Thomas B. Baird, Jr., Esq., the Commonwealth's Attorney who prosecuted the cases against Davis in the Wythe County Circuit Court. Baird wrote that although he had heretofore strenuously opposed Davis' release, "the sentence [sic] now being imposed throughout the majority [sic] of the Commonwealth and the Nation for comparable acts of drug distribution are extremely light and in most cases, insignificant." He continued by stating, "[i]n view of such, I think a gross injustice would be done should I not recommend his immediate release with the remainder of his term suspended."

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS CONSIDERED RUMMEL V. ESTELLE, 445 U.S. 263 (1980) IN DECIDING THIS CASE ON REMAND, AND PROPERLY DETERMINED THAT RUMMEL DOES

NOT COMPEL REVERSAL OF THE DISTRICT COURT DECISION.

This Court vacated the prior en banc affirmance of the district court's grant of a writ of habeas corpus, and remanded to the Fourth Circuit for reconsideration in light of Rummel v. Estelle, 445 U.S. 263 (1980). The Fourth Circuit correctly decided that Rummel does not require reversal of the previously-affirmed district court opinion. While Mr. Justice Rehnquist, writing for the majority, declined to find Rummel's life sentence under the Texas recidivist statute to be cruel and unusual punishment, his overriding concern was the compelling interest of the State of Texas "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as

established by its criminal law." 445 U.S. at 276. Rummel had been "graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail." 445 U.S. at 278. No such opportunity exists in this case to justify the imposition of a 40-year sentence.

The majority opinion specifically reserved the question of "whether Texas could impose a life sentence upon Rummel merely for obtaining $120.75 by false pretenses." Id. That is the question addressed by the district court in this case. There is no enhanced sentencing provision in this case, which involves a 40-year sentence for two offenses involving extremely small amounts of marijuana, having a "street" value of approximately $200.00. Davis was not sentenced as a recidivist, and the Commonwealth has

shown no compelling interest in having him incarcerated for twice the maximum punishment prescribed by Virginia for second degree murder. See Va. Code § 18.2-23.

Both the majority and dissenting opinions in Rummel indicate that a proportionality analysis should be applied in the extreme case of a life sentence for overtime parking. The case at hand approaches that degree of irrationality. The district court found, based on evidence presented to it, that the crime involved "minimal, debatable danger to the person." 432 F. Supp. at 452. In some jurisdictions, offenses involving small amounts of marijuana are now treated very much like parking tickets, with the offender mailing in a nominal fine. See, e.g., Oregon Rev. Stat. § 167.207 et seq. The forty-year sentence imposed on

Davis approximated his life expectancy at the time it was handed down, without discounting for the dangers of the penal environment. This case thus represents a version of the "extreme example" noted by the Court in Rummel.

Furthermore, Rummel did not totally reject disproportionality as a ground for challenging a sentence on Eighth Amendment terms; but rather, in reviewing the scheme of punishment for recidivists in Texas, questioned the efficacy of the traditional gauges frequently applied in determining disproportionality. In fact, the Court's opinion in Rummel weighed several factors, including the sentence given, the nature of the crime(s), comparative sentences available in other jurisdictions, and society's interest in punishment, concluding that Rummel's

sentence did not constitute cruel and unusual punishment. Finding a particular analysis inappropriate to a particular case is far different from rejecting that analysis in toto.

The Commonwealth cites Hayes v. Bordenkircher, 621 F.2d 846 (6th Cir. 1980) for the proposition that "'Rummel v. Estelle removes the Hart [v. Coiner, 483 F.2d 136 (4th Cir. 1973)] tests from our consideration.' 621 F.2d at 848." Like Rummel, Hayes was a recidivist case involving a defendant convicted of a third felony and sentenced to life imprisonment. Following the precepts of Rummel, the Sixth Circuit found the state's interest in discouraging recidivism to be so strong that a life sentence could never be disproportionate to a recidivist's crimes. Although the Sixth Circuit ruled that the Hart ana-

lysis was not applicable to Hayes, that decision did not purport to reject the use of the proportionality test to gauge the constitutionality of the sentence imposed for a substantive offense.

Similarly, the Commonwealth notes United States v. Wylie, 625 F.2d 1371 (9th Cir. 1980) (15 years not unconstitutional punishment for participating in large-scale LSD manufacturing and distribution operation involving more than 250,000 doses of LSD); Britton v. Rogers, 631 F.2d 572 (8th Cir. 1980) (Life imprisonment for rape not unconstitutional); and Government of Virgin Islands v. Berry, 631 F.2d 214 (3d Cir. 1980) (35 years for second-degree murder not disproportionate), as citing Rummel in support of their conclusions. To compare possession and sale of less than nine

ounces of marijuana to murder, rape, or manufacturing a quarter-million doses of LSD only serves to highlight the triviality of Davis' crimes.

Another case cited by the Commonwealth, Terrebonne v. Blackburn, 646 F.2d 997 (5th Cir. 1981), decided en banc by a sharply divided court, upheld the imposition of a life sentence on a heroin addict who had sold 19 packets of heroin to undercover police agents. Judge Rubin, writing for a plurality of ten circuit judges (two judges having concurred in part with the opinion but filed separate concurrences) found that "[a] life sentence for the crime of distributing heroin serves substantial state interests in the same manner that state interests were served by a life sentence for recidivism in Rummel." 646 F.2d at 1002. He further stated that Louisiana "could reasonably treat

heroin distribution as a serious crime equivalent to crimes of violence." Id. Although reciting that the Court in Rummel had rejected Fifth Circuit's proportionality analysis contained in earlier Rummel decisions, he acknowledged that Mr. Justice Rehnquist, in Rummel, had recognized "that a proportionality principle could come into play in an 'extreme example'." Id.

Nine circuit judges in Terrebonne joined in Judge Frank Johnson's lengthy dissenting opinion, which pointed out that the Rummel court had in fact used the concept of proportionality in upholding the life sentence in that case. Judge Johnson aptly noted that "[t]he extremely valid interest that states have in punishing or isolating those criminals who have demonstrated a propensity for com-

mitting criminal acts cannot easily be compared to the interest of a state in making criminal one specific act." 646 F.2d at 1005. According to Judge Johnson, although the use of the three-pronged test to determine disproportionality may have been inappropriate in evaluating recidivist laws, "the Supreme Court did not foreclose the use of that criterion in challenges to other statutes." Id. at 1006.

Close scrutiny of the various circuit court decisions applying the tenets of Rummel reveal no meaningful conflicts between them. All of the cases decided thus far which have upheld the sentences against Eighth Amendment challenges have involved either serious crimes of violence or highly dangerous or addictive drugs. The case at bar easily fits into that category of an "extreme example" of

where the punishment is so grossly disproportionate to the offenses it mandates the application of the objective factors so carefully employed by the district court below.

The preservation of federalism and allocation of powers between the state and federal governments is stressed in Rummel. Mr. Justice Stewart, in his concurrence, indicated that his unwillingness to invalidate the recidivist legislation of Texas was based upon a deference to the state's automony in the exercise of its police power. No such concern need sway the decision in this case, since the General Assembly of Virginia has seen fit to change the penalties to allow for sentencing which is proportionate to the amount of marijuana involved. The maximum sentence has now been reduced to 10 years (from 40 years) for

each count of distribution or possession with intent to distribute a quantity ranging from one-half ounce to five pounds. Va. Code § 18.2-248.1. The finding of the district court that defendant's sentence in this case constitutes cruel and unusual punishment is, although antecedent, entirely consonant with the expressed judgment of the elected representatives of the people of Virginia. Rather than deferring to a legislative judgment which the Virginia General Assembly itself has abandoned, the Court should allow the defendant's sentence to be abrogated in accordance with "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1956).

II

THE FOURTH CIRCUIT CORRECTLY FOUND THAT THE DISTRICT COURT, RELYING ON OBJECTIVE FACTORS UNIQUE TO THIS CASE, PROPERLY RULED THAT DAVIS' SENTENCE CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT.

The function of the court of appeals is not to substitute its judgment for that of the district court, nor to retry factual issues. Britton v. Rogers, supra. The district court's factual determinations in habeas corpus cases should be affirmed "unless the findings are clearly erroneous." Crabtree v. Boles, 339 F.2d 22, 24 (4th Cir. 1964). The district court in this case heard evidence and made detailed findings of fact applying objective factors in determining that Davis' punishment was cruel and unusual. The Fourth Circuit properly refused to overturn findings of fact based upon objective criteria

where those findings were not shown to be clearly erroneous.

This Court in Rummel stressed the importance of using "objective factors" in formulating Eighth Amendment judgments. While the Court noted that the death penalty decisions are of limited usefulness in determining whether a sentence constitutes cruel and unusual punishment, 445 U.S. at 272, the plurality opinion in Coker v. Georgia, 433 U.S. 584 (1977) is cited as being informed by "objective factors." 445 U.S. at 284. Mr. Justice Rehnquist notes that in Coker the Court was able to discern a "bright line" between death and all terms of imprisonment. Even though "considerably clearer" there "than would be any constitutional distinction between one term of years and shorter terms of years," 445 U.S. at 275, the possibi-

lity of judging terms of years using these objective criteria was not totally rejected in Rummel. Mr. Justice Rehnquist's stated concern was that "the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of the individual Justices." Id.

The disproportinality analysis applied by the district court in this case was not designed to determine whether, in general, a 40-year sentence and $20,000.00 fine is cruel and unusual punishment for possession and sale of marijuana; rather, it was used to determine whether that sentence is disproportionate to this particular crime. Judge Turk, in addressing this issue, observed as follows:

> Clearly, the relevant question specifically concerns whether the sentence of 40 years in the penitentiary and the imposition of twenty

> thousand dollars in fines for the possession and sale of less than nine ounces of marijuana is so grossly disproportionate that it ceases to be rational. The Virginia statute prohibiting the possession and sale of marijuana does not provide increased punishment corresponding to the quantity possessed or sold, and this court cannot so require. But neither can this court be blind, in determining proportionality, to the fact that the quantity involved is less than nine ounces. The important factor is not that the legislative purpose could be served by a less severe punishment, for that is a judgment for legislatures to make, but that it would be served by a "significantly less severe punishment." "If there is a significantly less severe punishment adequate to achieve the purpose for which the punishment is inflicted, [citations omitted] the punishment inflicted is unnecessary and therefore excessive." Furman v. Georgia, supra, at 279 (Brennan, J., concurring).

432 F. Supp. at 452 (footnote omitted).

The district court cited Gregg v. Georgia, 428 U.S. 153 (1976) as sup-

port for the proposition that proportionality is to be considered when a sentence is evaluated both in the abstract and as applied to a particular individual. Id. at 450, fn. 6. In Gregg, this Court upheld a sentence of death in a case where the jury was required to find certain factual bases making it appropriate (not disproportionate) to the particular crime involved. The Court specifically noted that "excessiveness" includes proportionality to the severity of the crime. 428 U.S. at 173, citing Trop v. Dulles 356 U.S. 86 (1958). In Robinson v. California, this Court found that while "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual... the question cannot be considered in the abstract." 370 U.S. 660, 667 (1962) (emphasis added).

The majority opinion in Rummel conceded that the Court might review the proportionality of the length of a sentence to the nature of the crime (445 U.S. at 274, fn. 11), but stressed throughout that "objective factors" must be considered in any such review. While not enumerating what objective criteria it would consider satisfactory, the Court cited Mr. Justice White's plurality opinion in Coker v. Georgia as employing such objective factors to consider whether a sentence is "'excessive' in relation to the crime committed" (and therefore barred by the Eighth Amendment). Included in these criteria were "public attitudes concerning a particular sentence--history and precedent, legislative attitudes, and the response of juries reflected in their sentencing." Coker, 433 U.S. at 592.

Among the objective factors analyzed by Judge Turk are the nature of the offense itself, the legislative purpose behind the punishment, the likely punishment for the same offense in other jurisdictions, the punishment in the forum state for other offenses and the punishment meted out for similar offenses within the forum state. 432 F. Supp. at 451-52. While these factors are not precisely the same as those listed by the Supreme Court in Coker, they do provide, as in Coker, a sound analytical basis for showing that the sentence involved is excessive when compared with the crime committed, and thus, unconstitutionally disproportionate.

One objective factor cited in Coker which is particularly applicable to this case is the history and patterns of legislative actions regarding

the punishment for a given crime. The Court in Coker meticulously examined the changing course of punishment for the crime of rape, 433 U.S. at 594-96, and found that a significant number of states whose death penalties were struck down did not re-enact the death penalty for that offense. Implicit here is a finding that the legislative purpose in preventing rape was apparently served by less severe punishments in those states.

Here, the district judge found that the legislative purpose behind Virginia's marijuana laws "is to stop the sale of a questionably harmful drug." 432 F. Supp. at 452. He based this finding concerning the lack of harmfulness upon expert testimony regarding the nature of marijuana and its effects. He emphasized that, to be constitutionally infirm, a sentence

must not only exceed the severity required to fulfill the legislative purpose, but there must be a "'significantly' less severe punishment adequate to serve the purpose for which the punishment is inflicted." Id. (Quoting Furman v. Georgia, 408 U.S. 238 (1972))

As previously noted, any conceivable legislative purpose in allowing lengthy sentences for convictions involving small amounts of marijuana has been abandoned by the changed statute providing graded penalties tied to the quantity involved. Since substantial, though lessened, penalties were retained (a sentence of up to 30 years for offences involving five pounds or more of marijuana), it must be concluded that the General Assembly

perceives that no valid legislative purpose is served by imposing forty year sentences in cases such as this. The value of "contemporary expression of legislative or public opinion" in making Eighth Amendment judgments as expressed in legislated changes is mentioned in Rummel as one objective factor which has been considered by the Supreme Court in previous cases. 445 U.S. at 280, fn. 22. Cf. Downey v. Perini, 518 F.2d 1288 (6th Cir. 1975) vacated 423 U.S. 933.

While this Court had difficulty with Rummel's contention that there is a nationwide trend toward lighter, discretionary sentences for recidivists, no such problem exists in this case. There has been a continuous and steady movement in this country in recent years towards reducing penalties for offenses involving small amounts of

marijuana, resulting in "decriminalization" in a handful of states and greatly reduced penalties in many more, including Virginia.

In looking to history as a source of objective factors regarding the appropriateness of a given sentence, this Court in Coker looked not only at recent changes in the punishment prescribed by state legislatures for rape but also at the tendencies of juries to hand down such a sentence for that particular crime. The Court observed that the death penalty had been involved in 6 of the 63 cases appealed to the Georgia Supreme Court since 1972, noting the fact that "in the vast majority of cases, at least 9 out of 10 juries have not imposed the death sentence." 433 U.S. at 597.

Although the Court found Rummel's interjurisdictional analysis, with its recitation of a "complex hierarchy of statutes... not entirely convincing," 445 U.S. at 263, the problem with this factor lay in the difficulty of the analysis required, given the various punishments for recidivism, the discretion (if any) in their imposition, and the number of prior convictions required to trigger the penalty. The Court did not reject *in toto* the use of interjurisdictional analysis.

The interjurisdictional analysis and comparisons in this case are quite simple. Here the district court found that only three states had greater maximum sentences than Virginia for the distribution of marijuana, and that no state had a greater penalty for possession with intent to distribute,

irrespective of the quantity involved. 432 F. Supp at 452-53, fn. 10.

In the instant case, Judge Turk relied upon sentencing statistics in making his decision as to the appropriateness of the sentence in this case when compared with other cases involving the same offense. It was stipulated that during the period between October 31, 1975 and August 19, 1976, out of a total of 117 Virginia defendants who were sentenced for possessing, selling and/or manufacturing <u>any quantity</u> of marijuana, the longest sentence given was 15 years. For crimes involving 9 ounces of marijuana, Davis received almost three times what was otherwise the maximum sentence handed down. Such a sentence is so out of the ordinary course of things as to be shocking to the conscience, or, in the words of Judge

Turk, "so grossly disparate that it ceases to be rational." 432 F. Supp. at 452. Indeed, the sentence seems to be wholly unprecedented in Virginia. This freakish element clearly indicates the sentence to be arbitrary and capricious, an element not found in Rummel.

The Court in Coker looked also to the nature of the offense itself, and compared the moral depravity and injury to the victim and the public inherent in rape to the crime of murder, and found the former to merit less severe punishment. There is no dispute over the right of the State to impose reasonable punishments for crimes involving marijuana. However, the seriousness of the harm to society and the degree of moral depravity of the crime itself must be weighed as factors in determining the constitutionality of the sentence given. The

threat to society, or to any given person, resulting from the possession and distribution of very small quantities of marijuana, presents, as found by the district court here, "minimal, debatable danger to the person." 432 F. Supp. at 452.

The district court also examined the punishment available in Virginia for other crimes as objective evidence as to whether the punishment in this case was disproportionate to the nature of the offense.

> In Virginia, at the time of Davis' convictions, other offenses which carried maximum sentences of twenty years included murder in the second degree; mob shooting, stabbing, etc. with intent to maim or kill; abduction; attempt to poison with intent to kill or injure; malicious shooting, stabbing, etc. with intent to maim, disfigure, disable or kill; and attempted murder. Chapter 358, §§ 18.1-23, 30, 37, 64,65, Virginia Acts of Assembly, 1960 session.

> Voluntary manslaughter, wounding a person in attempting or committing a felony, and taking indecent sexual liberties with children on the other hand carried only five year maximum sentences. Chapter 358 §§ 18.1-24, 68, 215(4), Virginia Acts of Assembly, 1960 session. Further, this court cannot help but notice that for distribution, as far as punishment is concerned, the Virginia legislature makes no differentiation of heroin from marijuana.

Id. at 453.

Given the estimate made by Dr. Dorothy B. Whipple at the district court proceeding that 30 million Americans have smoked marijuana (therefore possessing it, and, by logical implication, requiring someone to sell it to them), Davis' sentence, unlike Rummel's sentence, cannot be justified on the basis of his incapability to conform to the norms of society. The legislative changes in Virginia mentioned previously also

indicate a growing realization of the comparitively non-serious nature of marijuana offenses, where very small quantities are involved.

Finally, an objective factor unique to this case is the letter from Thomas B. Baird, Jr., the Commonwealth's Attorney who prosecuted the case in state court, contained in the record. Baird noted the "insignificant sentences" being imposed across the State and nation for comparable acts of drug distribution and candidly acknowledged that, in light of the wide disparities in sentencing, continued incarceration of Davis would represent a "gross injustice."

CONCLUSION

The subsequent revision of the statute under which respondent was sentenced has seriously diminished the

precedential importance of this case. Additionally, the district court's method of reviewing the term-of-years sentence, approved by the Fourth Circuit, is soundly rooted in established legal principle and presents no new significant legal issues for this Court's consideration. The Fourth Circuit's allowing the application of the proportionality criteria is not in conflict with the dictates of this Court as set forth in Rummel v. Estelle, and comports with the established rule in the other circuits. Those circuits reaching different conclusions in Eighth Amendment challenges to sentences are easily distinguishable from the case at bar; no case upholding a sentence comparable to Davis' involved an offense as insignificant as two offenses

committed by the respondent herein. The decision to invalidate the sentence was, in light of long-standing criteria applied by this Court, fair and proper, and was supported by substantial evidence. For the foregoing reasons, certiorari should be denied and the judgment of the Court below should be affirmed.

Respectfully submitted,

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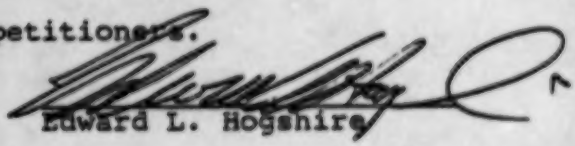
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CERTIFICATE OF SERVICE

I, Edward L. Hogshire, coun-

sel for Respondent, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 28th day of August, 1981, I mailed or delivered the requisite copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to J. Marshall Coleman, Esquire, Attorney General of Virginia and to James E. Kulp, Esquire, Deputy Attorney General, 900 Fidelity Building, 830 E. Main Street, Richmond, Virginia, 23219, counsel for petitioners.



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